83-306

NO._____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1983

LOUISE PARROTT,

v. Petitioner,

MAX V. WILSON et al.,

Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE ELEVENTH CIRCUIT COURT OF APPEALS

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QUESTIONS PRESENTED

1. Whether the courts below erred in denying Petitioner any opportunity, either through pre-trial discovery, continuance, mistrial or post-trial relief, to develop her case as to the defendant's mental disability, revealed shortly before trial, and again during trial, when the mental disorder was shwon to have occurred before the killing of Petitioner's deceased rather than after as the defendants contended in their pleadings.

2. Whether the courts below properly construed Rule 39, Fed. R. Civ. P., to deny Petitioner a discretionary jury trial focusing only on Petitioner's alleged failure to state any reason for not demanding a non-discretionary jury trial.

3. Whether the court below erred in failing to impose any sanctions on the defendants, who after grant of a motion to

compel, answered Petitioner's interrogatories en masse rather than filing individual answers.

4. Whether the court below erred in ruling that Petitioner forfeited the work product privilege solely because he clandestinely taped conversations with witnesses.

5. Whether the decision upholding the involuntary dismissal at the close of Petitioner's evidence on the defense of justification and the finding of lawful eviction was clearly erroneous.

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PETITION FOR A WRIT OF CERTIORARI
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COURT OF APPEALS

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Eleventh Circuit Court of Appeals entered on June 23, 1983.

OPINIONS BELOW

The decision of the district court, granting defendants' motion for involuntary dismissal at the close of Petitioner's evidence was based on oral unreported findings. It was entered on September 21, 1981 (R631,632, T300). The decision of the Eleventh Circuit Court of Appeals, consolidating both Petitioner's appeals in this case, from the underlying judgment and the Rule 60(b) motion to set aside, is reported, Parrott v. Wilson, ___F.2d___, (11th Cir. 1983), and a copy is set forth in Appendix A.

JURISDICTION

The judgement of the Eleventh Circuit Court of Appeals was entered on June 23, 1983. Jurisdiction is invoked under 28 U.S.C. 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Seventh Amendment to the United

States Constitution provides: "In suits at common law, where the value in controversy exceeds twenty dollars, the right of trial by jury shall be preserved and no fact tried by a jury, shall otherwise be reexamined in any court of the United States, than according to the rules of common law."

STATEMENT OF THE CASE

This is a wrongful death and civil rights action arising out of the killing of Petitioner's decedent on September 9, 1977 when Jeffrey Parrott was shot and killed by Fulton County Deputy Marshal Max v. Wilson while Wilson was attempting to effect the eviction of the premises that Jeffrey Parrott resided in (Wilson 79,80, T115).* Jeffrey Parrott was a twenty-three year old male with a high school education

*The record below is referred to as (R), the trial transcript as (T), the record in the second appeal as (SRA), and the depositions are referred to by name.

having no criminal record, being in good health and was described by his mother as being quiet and easygoing. (T8,11,31,33 Ex. 21).

Although Jeffrey Parrott lived at the premises at 5048 Campbellton Road (T 19, 66, 150, 180) the eviction papers did not include him as a party (Ex. 13). The order to evict a man named Kenny Howell, residing at this address, was signed on September 8, 1977 (Ex. 13, T113). The marshals, Wilson and Paugh, went to the premises at approximately 9am on September 9 to effect the eviction (T114,115).

Paugh testified that a few days before the eviction order was signed that he and Wilson visited the premises to inform Kenny Howell of the impending eviction (T111).He was told that someone else lived there who refused to move (T111). Paugh said that he relayed this information to Wilson (T112). But he said that he did not try to find

out who was in the house or to contact the landlord (T112). Wilson gave a different version saying the person they met said there was a man living in the house who "wasn't going to go" and "we weren't going to put his shit on the street." (Wilson 53). On the morning of the eviction Paugh and Wilson met the landlord at the premises before entering the house. Paugh said they had reason "to believe someone was there but didn't ask the landlord" (T118).

Wilson claimed that he had to forcibly enter the house with his gun drawn (Wilson 49). Upon entering, Wilson said he thought someone was in the house because he heard music (Wilson 48). Wilson said he walked through the house but did not see anyone so he put his gun away and told Paugh to come in (Wilson 59). Wilson said that when he then tuned around he saw Parrott standing 12 feet from him in a bedroom door and

that Parrott was shirtless, holding a gun pointed directly at him (Wilson 60). But in his police statement Wilson contradicted himself saying: " I did have my gun out" when he turned and faced Parrott (Ex.25).

Wilson said that Parrott accused him of breaking into the house and told him that the eviction papers were not good against him (Wilson 61,62). Neither Wilson nor Paugh were in uniform nor were they distinguishable as law enforcement personnel (T 137, Wilson 42).

Wilson and Paugh said that neither attempted to draw their guns although they were in fear of their lives (T132, Wilson 71). Even though in fear of their lives, Wilson told Paugh to go outside and tell the landlord, Johnson, not to come into the house because of Parrott's alleged threat against Johnson (T125, Wilson 69). Paugh said: " I turned my back and walked out the

door" (T120). Parrott did not object nor attempt to interfere with Paugh's leaving (T128). Wilson said "Jeff let him go outside, yes" (Wilson 70). Paugh said that he walked out to where the lanlord was and told him of the threat (T127). Although Paugh had a radio in his car, which was parked in the driveway beside the house, Paugh did not radio for help (T130).

Outside with the landlord were two men, Wardell Sharp and John Godfrey, whom the landlord had employed to help evict the premises (T36,42). Sharp observed both deputies go into the house (T40).Sharp said one of the deputies then came out and said "his partner would kill him if he had to" (T44). Sharp said that all four of them got down beside the truck (T45). Sharp said the marshal did not mention any of the alleged threats (T40-44). Sharp, a Viet Nam combat veteran, siad that when Paugh came out he

did not get the impression that his partner was in danger (T51). Sharp said that Paugh's actions were a surprise in that Paugh did not back up Wilson but left him in the house (T47). Sharp said Wilson came out and said "I guess the sonofabitch (sic) is dead (T147).

Wilson said that he drew his gun and shot Parrott when Parrott backed into the bedroom and leaned over the bed (Wilson 79). In his police statement Wilson gave conflicting statements about the deceased's position when Wilson drew his gun, saying at one point that the shotgun was not loaded and that Parrott was going into the bedroom to get another gun (Wilson 74). Wilson said that at that point that he believed that Parrott had dropped his guard, so he fired (Wilson 79). In his police statement Wilson said: "He was reaching over the bed as if he was getting somethin else, at

which time I spun around and fired three shots" (Ex. 25). Wilson said that he was sure the first shot immediately killed Parrott(Wilson 79,80)."I seen the first round hit him right here. The only thing I remember, he just grinned a little bit, he spun, and like I say I fired three rapid shots...the second round got him in the middle of the back" (Wilson 80). Wilson said that he was from six to ten feet away from Parrott at the time he shot (T81).

His statement as to the distance was in direct contradiction to the medical examiner who said that the first shot was fired from a distance of less than 12 inches (Burton 13). A second shot was in the back from a distance of 24 inches and the third grazed the deceased (Burton 8, 14). Burton did not find any evidence that Parrott held a gun or that he was near a weapon that fired (Burton 16). The shotgun was never

examined for fingerprints (T165). Two witnesses said that gun was not operable (T 149,178). One said the stock was cracked and it "had a piece of leather around it and had little leather symbol on it,little leaves type detail. I think it had a strap around the barrel that held the barrel to the stock" (T152). The gun was admitted at trial in this described condition (T164). Although nobody from the crime lab testified,the Court of Appeals nevertheless found that the gun did fire, based on a hearsay report from the crime lab not in evidence (Ex.1).

Burton added that Wilson had told him that Parrott did not have a gun when he shot him but that Wilson thought he was reaching for a gun (Burton 23). Another witness, Daisy Fountain, age 57, arrived on the scene minutes after the shooting and said wilson came out the door and he was

laughing and he had a gun on his finger going around and around like this....he came out slinging it on his finger." (T59, 60).

Neither Wilson nor Paugh received any kind of special training by Fulton County when they were hired (Wilson 11,12, T101). They did receive on the job training during the six month probationary period (T102). There was no psychological testing (T 82, 101). The deputies did not receive any training in the use of force, deadly force, or the use of firearms even though they were issued firearms and carried them at all times (T70,75,105,107,92). The deputies were simply taught to use 'whatever force was necessary' (T67).The chief Marshal said that he did not feel that any training was necessary (T67). He said that there were no written rules or procedures for the office (t90). He said the marshals were left to

their own judgement to decide when to use force (T93).

There were no programs or policies to identify training needs (T85). There were no formal complaint procedures (T83). There were no procedures to identify psychologically unfit marshals: "I couldn't know about it unless I had been notified by some official documents or what have you". (T84).

Barfield said the marshals were taught to effect an eviction immediately upon receiving the order without giving notice to the tenant (T79). They were also taught to evict the premises and "don't worry about names" on the warrant (T94).

Commisioner Brownlee did not know whether they were properly trained nor had he ever made any effort to find out if they were properly trained (T191). He said he wouldn't know if there were training defi-

ciencies or not (T193).

Plaintiff supported her case by expert testimony from Dr. James J. Fyfe of Reston, Virginia (T195,211). Dr. Fyfe had been a policeman for 16 years (T196). He had a Ph.D. in Criminal Justice and was a Professor and a Consultant (T196,197). Fyfe had been involved in formulating and implementing training programs for officers (T198). He had an extensive background in the use of deadly force (T198).

Fyfe concluded the shooting wasn't necessary: "My opinion is that proper training programs would have enabled the officers involved to have avoided shooting Mr. Parrott." (T215).

Based on his study of the case (T212), Fyfe testified the operation of the Fulton County Marshal's Office was "not in conformance to the standards of the profession" (T213).

Fyfe cautioned that one cannot "look at the situation at the instance the trigger was pulled" because the marshals were not "dropped into the house out of a vacuum" (T252). The Court of Appeals did not heed this admonition in the events that led up to the shooting, the officers repeatedly failed to follow correct procedures that would have obviated the need for the killing (T221). Even though you can't "judge the necessity for the use of deadly force by the set of circumstances that existed just at the instance the trigger was pulled" (T243) there were other, less drastic alternatives available to Wilson at the time he shot Parrott (T219,251,252). But "disabling Parrott or calling for assitance was precluded because the officers had not been taught to do these things." (T219).

The expert testified the marshal's

approach to the situation was procedurally incorrect from the start when they failed to respond to information that the man might be hostile (T215). There was no call for assistance nor any effort to "personalize the situation" (T216). Fyfe said that when both officers confronted Parrott, Parrott was, in effect, neutralized but Paugh, in turning his back and walking out, violated "the most basic principle of law enforcement procedure" (T218).

Fyfe stated that the confrontation was a predictable one based on the marshals' statements about the numerous times that they confronted situations invovling hostile evictions and similar situations (T 137,235, Wilson 54). The Court of Appeals ignored this evidence.

Fyfe said that a proper training program would have taught the officers a "whole range of less drastic alternatives avail-

able to them in the use of the gun and those alternatives include physical self defense measures", including the use of a baton, nightstick, and chemicals (T206).

At the close of the Petitioner's evidence the trial court granted an involuntary dismissal saying the shooting was justified and the eviction lawful (T300).

REASONS FOR ALLOWING THE WRIT

I. THE DECISION BELOW, IN DENYING THE PETITIONER ANY OPPORTUNITY TO MAKE OUT HER CASE AS TO THE DEFENDANT'S MENTAL DISABILITY, HAS SO FAR DEPARTTED FROM THE USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

The Petitioner was cut-off from any opportunity to obtain the facts surrounding defendant Wilson's mental disability. The Court of Appeals has overlooked the fact that the disability did not become an issue until July 17, 1981, two months before trial. The defendants' motions repeatedly stated that the mental disability occurred

after the shooting of the deceased.

Moreover the defendants waited until just three weeks before trial to file a motion to declare Wilson "unavailable as a witness" urging as grounds that he "is presently suffering from mental infirmities which render him emotionally unstable." The defendants represented in this August 27, 1981 motion that the condition occurred subsequent to the shooting and killing of Jeffrey Parrott (R 615-617, FRA 10).

The record in this case clearly shows Petitoner's motion to reopen discovery was timely filed on July 27, 1981, ten days after Petitioner learned of Wilson's incapacity and seven days after discovery ended (R269). Petitioner was not advised of a ruling on this motion until the day of trial and no reason was given for denying the motion (T3). The Court of Appeals chose

to ignore these facts and held that the motion was partially granted during an unrecorded pre-trial conference held on July 27, 1981, the day the motion was filed. This assertion was based on a clerk's entry on the docket sheet in this case (R7). Not only does the record contradict this finding but this finding is not true. Whatever weight the the docket sheet carries it simply does not substutute for the proper order from the trial court. Every judgment or order must be set forth on a separate document from the docket entry. Levi v. Wear Ever Aluminum, Inc., 427 F.2d 847 (3rd Cir. 1970). The court enters judgments, the clerk only enters them on the records. Burke v. C.I.R., 301 F.2d 505 (2nd Cir. 1962). The parties cannot rely on docket entries. Kappaport v. United States, 557 F.2d 605 (4th Cir. 1977). See also Local Rule 91.8 (N.D. Ga.) which requires that all

orders of the trial court be reduced to writing and signed by the court.

Moreover the entries on the docket sheet are self-impeaching in that the record clearly shows that no such orders were entered. Another entry shows that a motion was granted 17 days before it was made (R626).

Clearly Petitioner could not continue discovery until the court ruled on the motion to reopen. Local Rule 181.1 (N.D. Ga.) clearly provides that discovery cannot be made after expiration unless upon order of the court. The Court of Appeals contends that Petitioner could have taken depositions. But who was Petitioner to depose? Certainly any attempt to depose Wilson would be met with objection. The interrogatories were proper and were clearly directed at ascertaining Wilson's condition, the history of the condition, his com-

petency at the time of the shooting, at his deposition and at the time of trial. The discovery was directed at ascertaining he names of all treating physicians, psychologists and psychiatrists. As Petitioner contended his letter was a response to the trial court's inquiry as to what discovery he needed (R575). This letter was not responded to by the defendants or the trial judge. The Court of Appeals not only misrepresented but failed to comprehend the importance of discovery as to Wilson's mental condition both as to unavailability and competence at the time of the shooting.

Not only were the defendant's pleadings misleading but Wilson's own statements obtained during discovery (R432). The record shows that Wilson made incorrect statements about his condition answering no to the question: "Have you ever had a nervous or mental breakdown; ever been treated or

nospitalized for such condition, or ever been adjudged mentally incompetent or legally insane?" (Ex. 26). Even in declaring Wilson unavailable the trial court found: "it appears sometime subsequent to the events upon which this lawsuit is based Max V. Wilson suffered a head injury which is responsible for impaired mental and emotional suffering." (R618).

Petitioner called Forrest Park Police Chief Joe Picard as a witness and subpoenaed his file on Wilson. Petitioner's purpose in calling Picard was to show that Wilson had been involved in shooting a fleeing felon before and this showed that he did not know the law and needed training. But Picard also brought with him records indicating that Wilson had suffered his mental disabilities for over twelve years. Petitioner moved for mistrial on the basis of discovery abuses and for mis-

trial and continuance based on newly discovered evidence (T266,267,268). No one, not even Picard contradicted Petitioner's assertions that he had never had access to that information.

The facts of this case are directly on point with the case of Seabolt v. Pennsylvania Railroad Company, 290 F.2d 296 (3rd Cir. 1961). There, a new trial was ordered when in the course of the trial, involving a back injury, the plaintiff's doctor revealed that he had treated him previously for a back injury. But there,as here, the opposing party failed to reveal this during the discovery process. Id., at 299. The court held the remedy of a new trial appropriate even though there was no motion for mistrial, continuance, or motion to reopen.

> It is true that we cannot say for a certainty that previous knowledge of this chiropractor's identity and what he was going to say would have changed the .... verdict. But it would have

> made a difference in Railroad counsel's approach to the testimony of several witnesses**** But as said by the Supreme Court, a litigant who has engaged in misconduct is not entitled to 'the benefit of calculation, which can be little better than speculation, as to the extent of the wrong inflicted upon his opponent.' Minneapolis, St. Paul & S.S. Marie Ry. Co. v. Moquin, 283 U.S. 520,521, 51 S.Ct. 501 (1931). id., at 299,300.

Accord Price v. Mosler, 483 F.2d 275 (5th Cir. 1973); Melanson Company v. Hupp Corporation, 391 F.2d 902 (3rd Cir. 1968).

Other jurisdictions have recognized a party's right to a new trial for evidence discovered during trial under these circumstances. Birmingham Electric Company v. Linn, 34 So.2d 715 (Ala. 1948); Friedman Bag Company v. F.E. Bladwin & Company, 58 P.2d 43 (Idaho 1937); Sweazy v. King, 58 SW 2d 659 (Ky. 1933). Courts have held that reversal is mandated, where, as here, the party moved for a continuance or mistrial. National Life and Accident Insurance Co. v. Curtin, 29 So.2d 577 (Ala. 1947; Sellers

v. Harvey, 249 SW 2d 120 (Ark. 1952); Adams v. Worley, 755 SE 2d 682 (Ga. 1953).

Raising similar grounds the Petitioner filed a Rule 60(b)(3) motion after trial on September 17, 1982 (SRA 9). On September 24, 1982, the defendants answered the motion (SRA 16). Petitioner responded on October 4, 1982 (SRA 21).

The district court entered its order denying the motion on October 1, 1982, having signed it on September 30, 1982 (SRA 20). The order said in its entirety:

> The Plaintiff has filed a motion pursuant to Rule 60(b)(3) and(6), Federal Rules of Civil Procedure,to set aside the judgment that has been entered in this case. This case is currently on appeal and the court has no jurisdiction to consider a Rule 60(b) motion (SRA 20).

In their original answer the defendants did not even raise this as a defense (SRA 16), but filed an amended answer after the district court signed its order.

While noting that this ruling of the district court was "technically incorrect" the Eleventh Circuit nevertheless affirmed in a footnote the entire appeal. See fn.8 Along with his motion the Petitioner had filed discovery requests as to Wilson's condition (SRA 61-66).

The evidence which was the basis of the motion and the motions at trial was a June 18, 1965 letter from Dr, Needham B. Bateman, M.D. who revealed that Wilson had a condition caused by an automobile accident and that his diagnosis was:

> The diagnosis at the time of his dismissal from Georgia Baptist Hospital was (1) cerebral concussion with acute brain syndrome and acute loss of memory...Although Mr. Wilson cannot remember normally yet, often being unable to remmeber what he said or saw two or three minutes past or what transpired that night, day or week before. (T Ex. 26).

This was the same diagnosis as given by the defendants' expert in 1981.

Moreover the defendants did not deny that they had commited fraud, misrepresentation or engaged in other conduct encompassed by Rule 60(b)(3) (SRA 16-18). The Defendants did not deny that they knew of Wilson's prior condition but only that they were not aware of the personnel file (SRA 16). Defendants did not deny that Wilson's current unavailability was from injuries received prior to the death of Parrott but only contended that "all evidence indicates" such (SRA 17). The defendants did not even contend that Wilson had recovered from his prior injuries and that he still suffred a disability therefrom.

In Kozier v. Ford Motor Company, 573 F2d 1332, 1346 (5th Cir. 1978) the Court held that the failure to disclose and turnover information contained in documents in possession of the adverse party that results in prejudice to the opposing party

requires granting a Rule 60(b)(3) motion. Here we have not only witholding of the documents and information but misleading answers to discovery requests and untruthful assertions in the defendants' pleadings. The Court found in Rozier that even if the documents themselves were not admissible that they would have clearly led to other admissible evidence. Id., at 1343. Citing United States v. Proctor & Gamble Co., 356 U.S. 677, 683, 78 S.Ct. 983, 986 (1958), the Rozier Court held that the liberal federal discovery rules were designed to "make trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." Rozier, supra at 1346.

> Through its misconduct in this case, Ford completely sabotaged the federal trial machinery, precluding the "fair contest" which the Federal Rules of Civil Procedure are intended to assure.

> Instead of serving as a vehicle for ascertainment of the truth, the trial in this case accomplished little more than the adjudication of a hypothetical fact situation imposed by Ford's selective disclosure of information. The policy protecting the finality of judgments is not so broad as to require protection of judgments obtained in this manner. Id., at 1346.

Moreover, Plaintiff was entitled to rely on the defendant's representations as to Wilson's condition. See Dollar v. Long Mfg. Co., Inc., 561 F2d 613, 616 (5th Cir. 1977). "Discovery by interrogatory requires candor in responding...The candor required is a candid statement of the information sought or of the fact that objection is made to furnishing the information." Id., at 616. Clearly this requirement of candor extends to factual representations in pleadings and depositions. Accord, Minneapolis St. Paul & S.S. Marie Ry. Co. v. Moquin, 283 U.S. 520, 521, 51 S.Ct. 501, 502 (1931).

II. THE DECISION OF THE COURT OF APPEALS DIRECTLY CONFLICTS WITH DECISIONS OF THE UNITED STATES SUPREME COURT IN FOCUSING UPON ONLY ONE FACTOR IN DENYING PETITIONER'S DISCRETIONARY MOTION FOR A JURY TRIAL AND IGNORING THE FACT THAT THE TRIAL JUDGE GAVE NO REASON FOR DENYING A JURY TRIAL AND THE RESPONDENTS DID NOT OPPOSE THE MOTION.

In denying the Petitioner's discretionary motion for a jury trial the Court of Appeals ignored the four factors that it was supposed to consider and set its own criteria. In Cox v. Masland, 607 F.2d 138, 144 (5th Cir. 1979), the court said that the factors to be considered are whether there would be surprise or prejudice to any defendant, whether it would delay or inconvenience the court and whether it was sufficiently early to avoid any disruption to the court, the trial schedule and the parties' preparation.

Petitioner did set out her reasons for making the demand (R417), citing the nature of the case and the status of the litigation

The trial judge gave no reason for denying the motion (R432) and the respondents herein did not oppose the motion. The jury demand was filed five months before trial and before the pre-trial conference. The case was on a trial calendar that included both jury and non-jury cases.

When a discretionary jury demand is made "the court should grant a jury trial in the absence of strong and compelling reasons to the contrary." Swofford B&W, Inc.,336 F.2d 406, 409 (5th Cir. 1964).

As argued infra the directed verdict was erroneous, thus, "it automatically follows the denial of (Plaintiff's) jury demand was prejudicial." McCorstin v. United States Steel Corp., 621 F.2d 749 (5th Cir. 1980). Under these circumstances the appellate court should review the directed verdict as made pursuant to Rule 50, Fed. R. Civ. P.. See Boeing v. Shipman,411 F.2d

365 (5th Cir. 1969 en banc).

The Seventh Amendment preserves the right to jury trial. Ross v. Bernard, 396 U.S. 531, 90 S.Ct. 733 (1970). Considering the course and disposition of the proceedings as discussed infra, "the purity of the judicial process and its institutions" mandated the relief of a jury trial." Kinnear Weed Corp. V. Humble Oil and Refining Co., 403 F.2d 437,439 (5th Cir. 1968).

III. THE DECISON BELOW IN FAILING TO IMPOSE ANY SANCTIONS FOR FLAGRANT ABUSE OF THE DISCOVERY PROCESS, IS IN CONFLICT WITH DECISIONS OF THE UNITED STATES SUPREME COURT AND OTHER FEDERAL CIRCUIT COURTS.

The decision below in failing to impose any sanctions for answering interrogatories en masse is without precedent. Contrary to the Court of Appeals the motion did ask for sanctions other than the striking of the defense of justification (R395,520). The interrogatories in question sought the

facts supporting the defendant's affirmative defenses, including justification as pled in the sixth and seventh defenses of the original answer (R35).

"Each interrogatory shall be answered separately, fully in writing, under oath." Rule 37(a)(3), Fed. R. Civ. P. Accord Dollar v. Long Mfg. Inc., 561 F.2d 613, 616 (5th Cir. 1977). The purpose of the rule is to prevent a partyfrom serving one answer response to several interrogatories. American Bank & Trust Company v. Federal Reserve Board,284 F.2d 424 (5th Cir. 1972).

The failure to enforce the order compelling answers was clearly an abuse of discretion as all questions pertaining to over 10 affirmative defenses were answered in this way. National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639,640, 97 S.Ct. 2778, 2780 (1976). The

deposition and discovery rules are to be accorded a broad and liberal treatment. Dollar, supra. Reversal is appropriate where the court's failure to require discovery "prejudiced improperly the plaintiff both in his preparation for trial and at the trial. Such prejudice can only be corrected by a new trial." McDougall v. Dunn, 468 F.2d 468,473 (4th Cir. 1972).

An order compelling discovery is to be scrupulously obeyed by the parties. Phillips v. Insurance Company of North America, 633 F.2d 1165,1167, fn. 5 (5th Cir. 1981). Here there was clearly an avoidance of discovery rather than a good faith effort to comply. General Dynamics Corporation v. Seib Manufacturing Company, 481 F.2d 1204, 1213 (8th Cir. 1973.

IV. THE COURT BELOW HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW, WHICH HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT AS THE WORK-PRODUCT PRIVILEGE SHOULD NOT BE VITIATED BY CLANDESTINE TAPING OF

CONVERSATION WITH WITNESSES.

No other court has held that clandestine taping of statements vitiates the attorney work product privilege. To allow this ruling to stand would interfere with the search for the truth as many witnesses will speak truthfully only off the record or when they are not being recorded. In fact this is precisely what happened in this case as one witness tried to change his story later only to find the earleir statement had been taped (Godfrey 16-20). In fact the district court did not even mention this secret taping as a reason for turning them over. Both Georgia and Federal law allow for taping under the circumstances here. See OCGA 16-11-62; 18 U.S.C. 2510, 2511; State v. Birge, 240 Ga. 501 (1978); White v. United States, 401 U.S. 745, 91 S.Ct. 1112 (1970). In fact numerous courts have held that tape recordings

are more accurate. See White, supra, 401 U.S. at 751; Commonwealth v. Gordon, 33 Cr.L. 2298,(Mass. Sup. Ct. 6/7/83).

The defendants' request for disclosure of tapes was improper just as the request for statements of witnesses in the hands of opposing counsel was ruled improper in Hickman v. Taylor, 329 U.S. 495, 508, 67 S.Ct. 385, 392 (1947). Disclosure was improper because here as in Hickman, 329 U.S. at 509, the identity of the witnesses were known, they were available to the defendant, there was no showing that the denial of the tapes would unduly prejudice the preparation of the defendant's case. "In our opinion, neither Rule 26 nor any other rule dealing with discovery contemplates production under such circumstances." Id., 329 U.S. 509.

> Here is simply an attempt, without purported necessity or justification, to secure written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties. As such, it falls outside the arena of discovery and contravenes the public policy underlying the orderly prosecution and defense of legal claims. Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney. Id., at 510.

The order compelling disclosure was clearly an abuse of discretion. Id., 329 U.S. at 512. Accord, Ford v. Phillips Electronics Instruments Co., 82 FRD 359 (E.D. Pa. 1979); Home Insurance Company v. Ballanger Corp., 74 FRD 93 (N.D. Ga. 1977). The Fifth Circuit has adopted the "substantial need" and "undue hardship" rule. J.H. Rutter Mfg. Co. v. NLRB, 473 F.2d 223, 244 (5th Cir. 1973). Where the defendant has access to witnesses and is able and has taken statements there is no

reason for plaintiff to turn over witnesses' statements taken by him. Hodgson v. General Motors Acceptance Corp., 54 FRD 445 (S.D. Fla. 1972). A party is entitled to discover the names and addresses of persons having knowledge of discoverable matter. United States v. Chatham City Corp., 72 FRD 640 (S.D. Ga. 1976). But in no event must a party turn over witness statements where the defendant made no effort to depose the witnesses. Hodgson, supra. The Court of Appeals fails to mention that other witnesses statements were ordered to be turned over and that the depositions in which the tapes were used were not taken until after the trial judge's order to disclose them.

V. THE DECISION BELOW IS CONTRARY TO THE DECISIONS OF THIS COURT AND WELL FOUNDED PRINCIPLES OF APPELLATE REVIEW IN THAT THE GRANT OF A DIRECTED VERDICT UPON THE DEFENSE OF JUSTIFICATION AND ILLEGAL TENANCY WAS CLEARLY ERRONEOUS.

As set out in the statment of facts the entry of judgment in favor of the defendants was clearly erroneous. This court's decision in United States v. United States Gypsum Company, 333 U.S. 364 (1948), established the rules for appellate review of fact finding. "A finding is clearly erroneous where, although, there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." id., at 395. It follows that the clearly erroneous rule is demanded where there is a total absence of evidence. See Duke Power Company v. Carolina Environmental Supply Group, 438 U.S. 59 (1978).

In Williams v. Kelly, 624 F.2d 695,697

(5th Cir. 1980), the court held that in wrongful death cases the constitutionality of the defendants' use of force rests on

> ...such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good faith effort to maintain or restore doscipline of maliciously and sadistically for the very purpose of causing harm.

Quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2nd Cir. 1974) cert. denied 414 U.S. 1033, 94 S.Ct. 462 (1973). Accord, Hamilton v. Chaffin, 506 F.2d 904 (5th Cir. 1975). "The use of deadly force here was unconstitutional, being excessive and unjustified, there being no substantial threat to life, serious bodily injury, nor was any likely to be made by the suspect." Mattis v. Schnarr, 547 F.2d 1007 (8th Cir. 1977); Landrum v. Moats, 576 F.2d 1320 (8th Cir. 1978). The officers had, literally, dozens of alternatives at their disposal

to subdue Parrott, if their story is to be believed.

Not only was the application of force unjustified at the time it was applied, but the killing was a direct result of the complete lack of training of the marshal, the lack of supervision and the lack of proper screening, which is especially so in light of Wilson's condition. Deliberate indifference or gross negligence to training and supervising is a proper basis of liability against the city and the supervisors. Owens v. Haas, 601 F.2d 1242 (2nd Cir. 1979). That there has been a failure to adequately train subordinate officers in necessary skills os a sufficient basis for liability. Dowell v. Lawson, 489 F.2d 877 (10th Cir. 1974); McClelland v. Facteau, 610 F.2d 693 (10th Cir. 1979). Here as in Beverly v. Morris, 476 F.2d 1357 (5th

Cir. 1972), there has been "a complete absence of any supervision or training of the deputy marshals in the use of force as well as other applicable areas." On this point, Roberts v. Williams, 456 F.2d 819, (5th Cir. 1972) is particularly instructive. There the supervisor was held liable for injuries inflicted on a prisoner by a trustee who had shot the prisoner accidentally, but had had no training in the use of guns or other police training.

Further the county and its officials and supervisors are liable because of inaction of officials in failing to set clear rules on use of deadly force, and by not enacting policies to discover training and procedure dificiencies to a deliberate indifference to or tacit authorization of prior unconstitutional acts. Schnell v. Chicago, 407 F.2d 1084 (7th

Cir. 1979). Where senior personnel have knowledge of a pattern of misconduct and do nothing, liability is established if the failure to act is grossly negligent or demonstrates deliberate indifference. Smith v. Amgrogio, 456 F.Supp. 1130 (D. Conn. 1978); Popow v. City of Margate, 476 F. Supp. 1237 (D.N.J. 1979); Cook v. City of Miami, 464 F. Supp. 737 (S.D. Fla. 1979); Mayes v. Elrod, 470 F. Supp. 1188 (N.D. Ill. 1979).

> From a legal standpoint, it makes no difference whether the Plaintiff's constitutional rights are violated as a result of police behavior which is the product of the active encouragement and direction of their supervisors mere acquiescence in such behavior. In either situation, if the police officials had a duty as they admittedly had here, to prevent the officers under their direction from committing the acts which are alleged to have occurred during the convention, they are proper in this action. Schnell, supra at 1086.

Accord Rundle v. Mulligan, 356 F. Supp. 1048 (N.D. Cal. 1972).

In ruling upon Petitioner's wrongful eviction claim ignored clearly established law and considered only the deceased tenancy. This position has been rejected by the Georgia courts. See Kerlin v. Lane Company, 165 Ga. App. 622 (1983). Even intruders have a cause of action for wrongful eviction. id., at 624. Moreover the Court of Appeals simply overlooked the fact that there is another law, other than the one they found was impliedly repealed that mandates prior notice before an eviction. See Ga. Laws 1968 Pp 1215,1216 (Ex. 28). Certainly due process requires notice and an opportunity to be heard before an eviction. See Hall v. Garson, 430 F.2d 430 (5th Cir. 1970).

Since the wrongful eviction was the proximate cause of the killing the deceased had a right to defend himself against the unlawful eviction. Ga. Code Ann 26-902,903 904; Rounsaville v. Alben, 44 Ga. App.534

904; Rounsaville v. Alben, 44 Ga. App. 534 (1931). "It is certainly sound law that if an arrest can be accomplished without taking human life, it is murder to take human life." Done v. State, 109 Ga. 486, 488 (1899). An illegal detention is an assault by the arresting officer and constitutes legal justification for employment of the arrested person of force sufficient to avoid arrest and repel the assault. Napue v. State, 200 Ga. 626, 629 (1946). Wilson entered the house with his gun drawn, used excessive force and wrongfully attempted to evice the deceased. Therefore any force used by ghe deceased was jsutified. Death caused by simple or ordinary neglgience is actionable under Ga. Code Ann. 105-1301. Western Atlantic Railroad Company v. Michael, 175 Ga. 1, 10 (1932).

CONCLUSION

The facts show that Petitioner's deceased was killed by a marshal who had no training, was not psychologically tested and who suffered severe mental disability at the time he shot the deceased. Nevertheless the courts below have not allowed Petitioner to develop this theory of the case. In fact, in order to uphold the decision of the district court, the Court of Appeals has gone outside the record, found facts directly contradicted by the record, ignored controlling principles of law and created new law. For these and the foregoing reasons this Court should issue a writ of certiorari to review the judgment of the Eleventh Circuit Court of Appeals.

J.M. Raffauf
Attorney for
Petitioner

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of this petition upon upon counsel for Respondent, Griffin Patrick, Jr., by mailing a copt to him at 610 Summit South, 777 Cleveland Avenue SE, Atlanta, Georgia 30310.

This the 21st day of August, 1983.

J.M. Raffauf

APPENDIX A

Louise PARROTT, individually and in her official capacity as Administratrix of the Estate of Jeffrey Parrott, deceased, Plaintiff-Appellant,

v.

Max V. WILSON, etc., et al., Defendants-Appellees.

No. 81-7843.
No. 82-8679.

United States Court of Appeals, Eleventh Circuit.

June 23, 1983.

Before JOHNSON and ANDERSON, Circuit Judges, and HUNTER*, District Judge.

R. LANIER ANDERSON, III, Circuit Judge:

Appellant, Louise Parrott, Administratrix of the Estate of Jeffrey Parrott,

*Honorable Edvin F. Hunter, Jr., U.S. District Judge for the Western District of Louisiana, sitting by designation.

brought this sec. 1983[1] action against Max V. Wilson and James E. Paugh, Deputy Marshals of the State Court of Fulton County, and assorted county officials alleging that the fatal shooting of her son Jeffrey Parrott by Marshal Wilson constituted a deprivation of federally protected rights. Appellant also appended state claims for trespass and wrongful eviction. After the presentation of her case, the court below entered judgment in favor of all defendants. After careful consideration of the multitude of issues raised on this appeal, we affirm.

I. FACTS

Our examination of the record discloses the following sequence of events. Mr. Frank L. Johnson owned a small house on Campbellton Road in Atlanta, Georgia. Beginning in 1971, he rented this house to Kenny Howell. Toward mid-summer of

1977, Howell fell behind in his rent payments. After attempting to work the problem out with Howell, Johnson instituted formal eviction proceedings in August of 1977. Sometime in late August or early September, Deputy Marshals Wilson and Paugh served notice of the impending eviction by tacking the eviction notice to the door of the Campbellton Road residence. At that time they were informed by an unidentified youth that Howell no longer lived there, but that someone else lived in the house who had stated an intention to ignore the eviction. Soon after the Marshals served the eviction notice, Johnson himself went to the Campbellton Road residence to perform some repairs. While there another young man, apparently Jeffrey Parrott, came out of the house and placed the eviction papers on the windshield of Johnson's car,

saying that he had no intention of either leaving or paying any rent. Johnson did not inform the Marshals of this encounter. The evidence is fairly persuasive, however, that Johnson had neither rented the residence to Parrott nor previously been aware of his presence on the property.

At approximately 10:00 a.m. on the morning of September 9, Johnson met Wilson and Paugh at the Campbellton Road residence to effect the eviction. At that time he told the Marshals that although he did not think anyone was in the house he was not sure. The Marshals stated that they would need some help emptying the house of its furniture, whereupon Johnson left to secure the necessary labor.

Upon Johnson's departure, Wilson and Paugh attempted to gain entry to the house. After knocking and identifying

themselves as Marshals, they unsuccessfully attempted to open the front door. At this point Wilson apparently told Paugh to check the back of the house while he checked the side. According to both Marshals, in proceeding around the house they shouted out their identities and their purpose several times, to no avail. While Paugh was at the back of the house Wilson located a side door, forced it open, and entered into a living room area. Wilson testified that after entering the house he heard music playing at a very low volume; he therefore pulled his gun. After examining the kitchen to his immediate left, Wilson holstered his gun and stepped back into the living room where he was confronted by Jeffrey Parrott. Parrott was armed with a sawed-off shotgun which he aimed directly at Wilson.

According to Wilson, Parrott accused him of breaking into the house and stated his intention to blow Wilson's head off.[2] While Wilson was attempting to persuade Parrott to leave peacefully, Marshal Paugh entered through the side door. Parrott then shifted his position slightly in order to cover both Wilson and Paugh with the shotgun. At about this time, Frank Johnson returned with two men to help him move the furniture. Wilson and Paugh both testified that upon noticing Johnson's arrival Parrott stated that if Johnson had been the one who had entered the house Parrott would have "blowed his head off." Hearing this, Wilson told Paugh to go outside and warn Johnson not to come near the house. Parrott apparently did not object to Paugh's leaving the house but refused to let Wilson leave.[3]

According to Johnson and his two assistants, Wardell Sharp and John Godfrey, soon after they arrived at the residence Paugh came out of the house and told them that there was a man in the house with a gun and that he had threatened to kill Johnson. Soon after Paugh conveyed the warning to Johnson, three shots rang out.[4] At this, Marshal Paugh cautiously headed back toward the house, whereupon Wilson came out of the door with Parrott's shotgun in his hand.

Wilson's precise words and actions upon leaving the house were a matter of some dispute. According to Paugh, Wilson's first statement was "I shot the man in self defense," and then Wilson broke down the shotgun to determine whether it was loaded. According to Sharp, when Wilson came out of the house he threw the shotgun on the ground and said "I guess

the son-of-a-bitch is dead now." Godfrey testified that Wilson apparently had already broken the shotgun down when he came out of the house and that he held two shells in his hand.[5]

The only living witness to the events that actually transpired inside the house after Paugh's departure was Marshal Wilson. He testified that after Paugh left the house he continued his attempts to talk Parrott out of resisting the eviction. At all times Parrott had the shotgun aimed directly at Wilson, and Parrott continued to assert that he would not leave the property. Soon Parrott began to back up towards an entrance to a bedroom. Wilson could see that immediately to one side of the doorway was a bed with an iron railing; he could not see the entire bed. Upon reaching the doorway Parrott leaned towards the bed, apparently reaching for something outside of Wilson's

line of vision. The shotgun remained trained directly on Wilson. Wilson stated that he believed Parrott was reaching either for another gun or for shells. With Parrott momentarily distracted Wilson drew his gun and fired three rounds rapidly at Parrott. Wilson saw the first round strike Parrott in the chest, spinning him around; the second round struck Parrott in the back and Wilson did not see the third round hit him. Wilson then picked up the shotgun and unloaded it as he exited the house.

According to Wilson, throughout the course of the incident there was a distance of several feet between Parrott and him. He stated that at the time of the shooting he was approximately 4 to 6 feet from Parrott, who had been backing up towards the bedroom door. However, Dr. Joseph L. Burton, the Fulton County

Medical Examiner, testified that Parrott's chest wound indicated that from "muzzle to target would have been less than 12 inches." As for the back wound, Burton determined a "range of approximately 24 inches, plus or minus 4 to 6 inches." Burton also testified that the bullets which struck Parrott's body apparently had been fired in rapid succession. Wardell Sharp, however, testified that there had been a pause between each shot.

After leaving the house subsequent to the shooting, Wilson and Paugh notified the police. No legal or disciplinary action was taken against the Marshals.

On September 7, 1979, Louise Parrott, the mother of the deceased, filed her complaint under 42 U.S.C.A. Sec. 1983 (West 1981), alleging that defendants' actions deprived Jeffrey Parrott of life and liberty without due process and equal

protection of the law. Appellant also asserted pendent state claims for trespass and wrongful eviction.[6] The theory of liability as to Marshals Wilson and Paugh was that the use of unreasonable deadly force deprived Parrott of his constitutional rights. As to the Fulton County defendants, appellant alleged that Parrott's death was the result of a policy or custom officially adopted by the County, and that the County defendants were guilty of gross negligence in failing properly to train and supervise Deputy Marshals.[7] The defendants' primary defense was that Marshal Wilson was legally justified in using deadly force against Parrott.

After lengthy discovery, which was extended by stipulation on many occasions, this cause was heard by the court sitting without a jury in September of 1981. At

the close of plaintiff's case, the district court expressly found that the defense of justification had been proved and therefore entered judgment for all of the defendants. From this judgment plaintiff appeals, asserting myriad errors on the part of the trial court. Several of these assertions deserve discussion.[8]

II. WAIVER OF TRIAL BY JURY

Appellant filed her complaint in September of 1979. At that time she did not request a trial by jury, to which she was otherwise entitled. On April 17, 1981, approximately a year and a half after the defendants answered her original complaint, appellant made her untimely request for a jury trial pursuant to Rule 39(b) of the Federal Rules of Civil Procedure.[9] Defendant Johnson formally opposed this motion on the ground that he would be seriously prejudiced because for

many months he had structured his trial preparation in anticipation of a bench trial. He also alleged prejudice by virtue of the initial involvement of an insurance company as a party. At the time of appellant's motion, discovery had not ended and in fact would not end for several months; the actual date of trial was five months off. Nontheless, the trial court denied appellant's motion.

In this circuit, the general rule governing belated jury requests under Rule 39(b) is that the trial court "should grant a jury trial in the absence of strong and compelling reasons to the contrary." Swofford v. B & W, Inc., 336 F.2d 406, 408 (5th Cir.1964), cert. denied, 279 U.S. 962, 85 S.Ct. 653, 13 L.Ed.2d 557 (1965); see Cox v. C.H. Masland and Sons, Inc., 607 F.2d 138, 144 (5th Cir.1979).[10] The district

courts have broad discretion when considering Rule 39(b) motions and often freely grant such motions after considering (1) whether the case involves issues which are best tried to a jury; (2) whether granting the motion would result in a disruption of the court's schedule or that of the adverse party; (3) the degree of prejudice to the adverse party; (4) the length of the delay in having requested a jury trial; and (5) the reason for the movant's tardiness in requesting a jury trial. See, e.g., Cascone v. Ortho Pharmaceutical Corp., 94 F.R.D. 333 (S.D.N.Y.1982); Pawlak v. Metropolitan Life Ins. Co., 87 F.R.D. 717 (D.Mass.1980); Three Rivers Rock Co. v. Weathers Towing, Inc., 82 F.R.D. 478 (N.D.Miss.1979); Priest v. Rhodes, 56 F.R.D. 478 (N.D.Miss. 1972); Mississippi v. Hurst, 41 F.R.D. 186 (N.D.Miss.1966). The decision by the dis-

trict court to grant or deny the motion is therefore reversible by this court only for an abuse of discretion. Although the normal practice in the district court is to balance all of the factors enumerated above, when reviewing a lower court's denial of a belated jury request our cases require that appellant courts give considerable weight to the movant's excuse for failing to make a timely jury request. If that failure is due to mere inadvertence on the movant's part, we generally will not reverse the trial court's refusal to grant a 39(b) motion. See Rhodes v. Amarillo Hospital District, 654 F.2d 1148, 1154 (5th Cir.1981); Mesa Petroleum Co. v. Coniglio, 629 F.2d 1022, 1029 (5th Cir. 1980); Bush V. Allstate Ins. Co., 425 F.2d 393 (5th Cir.), cert. denied, 400 U.S. 833, 91 S.Ct. 64, 27 L.Ed.2d 64 (1970); accord United States v. Unum, Inc., 658 F.2d 300

(5th Cir.1981).[11] In the case before this court, appellant has nowhere stated the reasons for her failure to request a trial by jury within the time provided in Rule 38(b). Following the foregoing case law, we therefore will not reverse the trial court's ruling.

III. UNAVAILABILITY OF DEPUTY MARSHAL WILSON AND DECISION TO ADMIT HIS DEPOSITION UNDER RULE 804(b)(1)

The only witness to the shooting of Jeffrey Parrott was Deputy Marshal Max Wilson. On or about July 1, 1981, counsel for the Fulton County Defendants was informed by the Fulton County Marshal's office that Wilson had left his position as Deputy Marshal due to a mental disability. On July 17, counsel contacted Wilson's psychiatrist, Dr. Elmer H. Harden, Jr., and apparently was told that Wilson's disability might make him unavailable for the upcoming trial. Defense counsel then

notified the appellant's attorney, and both parties deposed Dr. Harden on July 21, 1981.[12] At this time approximately two months remained before trial; discovery had formally ended, however, on July 17, 1981.

At his deposition Dr. Harden testified that Wilson had been referred to him by a neurologist on January 28, 1981. Dr. Harden found Wilson to be suffering from grand mal seizures, absence seizures, and dementia or serious depression.[13] According to Dr. Harden, the seizures could be controlled through medication and in fact their frequency had decreased substantially. On the other hand, he stated that there was no medication that could be used to control Wilson's dementia.

Dr. Harden did not have personal knowledge of the origin of Wilson's disorders. Rather, Wilson had told him that

he had suffered a head injury in a fall in mid-1978. In December of 1978, he apparently suffered his first seizure and did not work for approximately two months. In the summer of 1980, the seizures recurred subsequent to an automobile accident and Wilson had not returned to work since that time. According to Dr. Harden, the types of seizures involved "would most definitely be of an organic basis."

Dr. Harden's prognosis for Wilson was somewhat bleak. He stated that in his opinion Wilson could not function in a stressful situation, and that because of Wilson's confusion and disorientation Dr. Harden would not "necessarily trust his memory at any time." Finally, Dr. Harden stated that it was extremely unlikely to expect any significant improvement within the next six months to

a year and one-half.

On the basis of Dr. Harden's testimony, the defendants told appellant that they would move to have Wilson declared unavailable and to substitute for trial testimony a deposition by Wilson dated February 29, 1980. This deposition had been taken after Wilson's injury in mid-1978 but before the subsequent recurrence of seizures in the summer of 1980, and almost one year before he sought Dr. Harden's medical assistance.

At the scheduled pretrial conference on July 27, 1981, appellant therefore moved to reopen discovery for the following purposes: (1) to ascertain for herself the extent of Wilson's disorder; (2) to hire another expert to examine Wilson; and (3) to determine why whe had not been informed of Wilson's condition at an earlier date. On September 11, the

trial court formally declared Wilson unavailable, admitting his deposition under Rule 804(b)(1), and on the 15th, one day before trial, the court formally denied appellant's motion to reopen discovery.

Appellant now challenges both the decision to declare Wilson unavailable and the decision to admit Wilson's deposition testimony under Rule 804(b)(1).[14] Our examination of Dr. Harden's deposition convinces us, however, that the trial court did not abuse its discretion in declaring Wilson unavailable: "The duration of the illness" was "in probability long enough so that, with proper regard to the importance of the testimony, the trial (could not) be postponed." United States v. Amaya, 533 F.2d 188, 191 (5th Cir.1976)(citing 5 Wigmore, Evidence Sec. 1406(a)(Chadbourn rev. 1974)), cert. denied, 429 U.S. 1101,

97 S.Ct. 1125, 51 L.Ed.2d 551 (1977).

With respect to the admission of Wilson's deposition in lieu of testimony, appellant argues that the defendants did not demonstrate Wilson's competence at the time of his deposition. Appellant adds that Dr. Harden's testimony demonstrates that at the time Wilson was deposed in February of 1980 Wilson already was suffering seizures and dementia. There are two answers to this contention. First, appellant did not raise in the court below the issue of Wilson's competence at the time of the deposition. Appellant raised this issue neither in her opposition to the defendant's motion to declare Wilson unavailable, nor in her motion during trial based on the revelation of Wilson's earlier episode involving mental health. See note 17 infra; Record at 622-23. Second,

the testimony of Dr. Harden does not, in our view, support appellant's assertions.

Wilson's first injury occurred in mid-1978; his first seizure in December of 1978 occurred over one year prior to his deposition in February, 1980. Apparently, he missed only two months of work as a result of the first injury, and there is no evidence of dementia throughout this period. Further, Wilson's second injury, which led to a recurrence of his seizures, occurred in the summer of 1980, several months after his deposition. Moreover, not until January, 1981, when Dr. Harden began treating Wilson, was there any evidence regarding the dementia which led to Wilson's unavailability. Thus, at the most the evidence suggests only that Wilson may have been suffering grand mal or absence seizures during the period in which he was deposed. A careful reading

of the deposition, however, makes it clear that such seizures did not occur during his examination. We therefore conclude that there is no factual basis for a challenge to the introduction of Wilson's deposition on the ground that he was incompetent at the time he was deposed.[15] Thus, the trial court did not abuse its discretion in admitting the deposition of Wilson in lieu of his testimony.

Appellant next contends that the trial court erred in denying her motion to reopen discovery for the purpose of informing herself as to Wilson's condition. The defendants argue, however, that at the pre-trial conference on July 27, 1981, the court stated that appellant would be allowed additional discovery by means of deposition; if this is true, then appellant had well over a month and a half in which to discover the information she deemed

necessary to her case. Appellant does not directly dispute this contention. In fact, the record convinces us that the defendants' version of the pretrial conference is an accurate one. First, the docket entry for July 27, 1981, states: "Court denied motion to add party and motion to reopen discovery, court will enter order on motion for S.J., deposition may be taken subject to rule up until trial." Record at 7 (emphasis added). Second, appellant's counsel sent a letter to the trial court one week after the pretrial conference. That letter makes clear that the appellant did have an opportunity to conduct limited discovery concerning Wilson's physical and mental condition.[16] Thus, during the time between the pretrial conference and the formal denial of appellant's motion on September 15, appellant was afforded the

discovery opportunity she requested; she simply failed to make use of that opportunity. We conclude that there is no merit in appellant's argument that the trial court abused its discretion in refusing to reopen discovery.[17]

IV. ATTORNEY WORK PRODUCT

During the course of discovery, defendants became aware that appellant's attorney had clandestinely taped telephone conversations with Wardell Sharp and John Godfrey--two of the witnesses to the events which transpired outside the house on the morning that Jeffrey Parrott was shot. Defendants therefore moved to compel production of the taped conversations. Appellant objected on the ground that the tapes were attorney work product and hence subject to the protection of Rule 26(b)(3) of the Federal Rules of Civil Procedure. The court ordered disclosure of the tapes.

Appellant here argues that the district court's ruling is reversible error. We reject this argument.

Recently, the United States Court of Appeals for the District of Columbia Circuit held that "in some circumstances, a lawyer's unprofessional conduct may vitiate the work product privilege." Moody v. IRS, 654 F.2d 795, 799-801 (D.C.Cir.1981); see Moody v. IRS, 682 F.2d 266,268 (D.C.Cir.1982)(same case after remand to district court). The court reasoned that the purpose of the work product privilege is to protect the integrity of the adversary process; therefore, it would be improper to allow an attorney to exploit the privilege for ends that are antithetical to that process. 654 F.2d at 800. In the instant case, the record clearly demonstrates that counsel for the appellant clandes-

tinely recorded conversations with witnesses. While this practice violates no law,[18] the Code of Professional Conduct imposes a higher standard than mere legality. The American Bar Association's Committee on Ethics and Professional Responsibility has ruled that the recording of conversations of witnesses without their consent is unethical. See ABA Committee on Professional Responsibility, Formal Opinions, No. 337 (1974);[19] Id., Informal Opinions, No. 1320 (1975)(refusing to reconsider Formal Opinion No. 337). See Also NYSBA, Committee on Professional Ethics, Opinions, No. 328 (1974).

We are mindful of the client's interest in protecting against the disclosure[20] of work product. However, we are unable to say that the disclosure in this case "traumatize(d) the adversary process more than the underlying legal misbehavior."

654 F.2d at 801. The only discernible effect of the disclosure was that the depositions of Sharp and Godfrey commenced with the playing of the taped conversations. We thus hold that whatever work product privilege might have existed[21] was vitiated by counsel's clandestine recording of conversations with witnesses.[22]

At the Close of plaintiff's case, defendants moved for involuntary dismissal pursuant to Rule 41(b) of the Federal Rules of Civil Procedure. The trial court made the requisite findings of fact, see Fed.R.Civ.P.52, and found for the defendants. Appellant now seeks to overturn this judgment.[23]

In our view, there was substantial evidence from which the trial court could conclude that Deputy Marshal Wilson was justified in shooting Jeffrey Parrott.[24]

The unrebutted testimony of both Wilson and Paugh established that when Wilson entered the residence he was accosted at gun-point by Parrott. Further, all witnesses to Marshal Wilson's exit from the residence after the shooting testified that he carried with him a sawed-off shotgun, which apparently had been loaded. A laboratory examination disclosed that this shotgun was capable of being fired. In addition, tertimony indicated that Parrott had been aware of the impending eviction and had demonstrated his unwillingness either to leave the residence or to pay the rent. Compare Roberts v. Marino, 656 F.2d 1112, 1114 (5th Cir.1981) with Mariorana v. MacDonald, 596 F.2d 1072, 1078-79 (1st Cir.1979). See generally Shillingford V. Holmes, 634 F.2d 263 (5th Cir.1981). Appellant's case rests largely upon the coroner's report

that Parrott ahd been shot from a closer range than that indicated by Wilson in his testimony. In addition, appellant points to testimony by its expert on police operations to the effect that Wilson and Paugh could have used other means to ensure a nonfatal end to this incident. This same expert, however, would not state categorically that the use of deadly force by Marshal Wilson was unfustified. We conclude, therefore, that the findings by the district court were not clearly erroneous.[25]

We have reviewed appellant's remaining contentions and conclude that they are without merit.[26] Accordingly, we affirm the judgment below in all respects.

AFFIRMED.

FOOTNOTES

1. 42 U.S.C.A. Sec. 1983 (West 1981).

2. Wilson and Paugh both testified that at the time of the incident they were not wearing a uniform but were wearing civilian clothes. Their only identification was a marshal's badge, which was concealed. In addition, they had arrived at the residence in an unmarked county car. On the other hand, Wilson and Paugh both testified that they had repeatedly identified themselves as Marshals both prior to and subsequent to entering the residence. Further, Wilson testified that the eviction notice he had served by tack service on the outside of the house was lying by the fireplace in the living room. Finally, at the time of the confrontation, Parrott referred to Wilson as a "pig." The evidence thus indicates that Parrott knew the "intruders" were officials, and not merely burglars.

3. According to the statement Wilson made to the police, he told Parrott "I am going to go and talk with Mr. Johnson and ask him if he will let you move by yourself." Parrott stated "you are not going anywhere, you are staying here." Exhibit 4 attached to Deposition of Max V. Wilson.

4. There is some dispute as to how soon after Paugh's leaving the house the shooting occurred. Johnson stated in his deposition that he heard the shots approximately 10 to 15 minutes after Paugh's warning. Godfrey testified that "it was probably a couple of minutes" after

Paugh came outside. Sharp testified that Paugh was outside "about 5 or 6 minutes" before the shots were fired. Sharp also testified that while he was outside Paugh stated "my partner will kill him if he have to [sic]." Paugh himself testified that the shooting occurred about 3 minutes after he went outside. At no time prior to the shooting did Paugh attempt to call the Police Department for help.

5. A neighbor, Daisy Fountain, testified that she heard over a police scanner a report of the shooting, whereupon she went to the Campbellton Road residence. She alleged that after waiting awhile outside the house she witnessed Marshal Wilson leave the house laughing and twirling his gun around on his finger. No other witness testified to such behavior by Marshal Wilson. Further, it is clear that Fountain could not have witnessed Marshal Wilson's first departure from the house since the shooting was not reported until after he left the house.

6. The original defendants in this action were Marshals Wilson and Paugh; former Chief Marshal of the State Court of Fulton County, Luke Davis; Fulton County; the Commissioners of the Board of Commissioners of Fulton County; and the surety for defendants Wilson, Davis and Paugh. Subsequently, Parrott moved to dismiss as party defendants Luke Davis and the surety since neither was a party in interest at the time of the incident. Immediately prior to trial in 1981, the plaintiff also dismissed her complaint against Frank Johnson without prejudice. Further, in her original complaint Louise Parrott asserted

standing in her individual capacity as the mother of the deceased. Subsequently, the court dismissed her claim sua sponte, but allowed her to amend the complaint and proceed as the administratrix of Jeffrey Parrott's estate.

7. Virtually all of the evidence demonstrates that at the time of the incident the training program consisted of a six month period of on-the-job probation. Marshals were not instructed in the proper use of handguns, nor were applicants screened for psychiatric fitness. On the other hand, there was no evidence of any episode involving the use of deadly force by a county marshal prior to the death of Parrott.

8. Judgment was rendered in this action on September 22, 1981, and appellant filed her appeal October 19, 1981. On September 17, 1982, during the pendency of this appeal, appellant filed a motion in the trial court to set aside the judgment because of fraud and misrepresentation by the defendants in withholding evidence of Wilson's mental disability some 12 years prior to the incidents in question. See note 17 infra; Fed.R.Civ.P. 60(b)(3) & (6) (fraud, misrepresentation, misconduct, or any other reason justifying relief). The district court declined to pass on the merits of appellant's motion, stating that during the pendency of the appeal from the jujgment it lacked jurisdiction over a Rule 60(b) motion. Appellant's appeal from this ruling was consolidated with her appeal from the judgment.

Technically, the district court's jurisdictional ruling was incorrect. We have recognized the discretionary power of a district court to consider such a motion even after an appeal has been noticed. See Lairsey v. Advance Abrasives Co., 542 F.2d 928, 930 (5th Cir.1976); Ferrell v. Trailmobile, Inc., 223 F.2d 697, 698-99 (5th Cir.1955). See also 11 C. Wright & A. Miller Federal Practice & Procedure: Civil Sec. 2873, at 265-66 (1973). The grounds alleged by appellant insupport of her motion, however, are substantially identical to issues raised in her appeal from the judgment. See Section III infra. Further, we hold below that appellant has not sufficiently alleged misconduct on the part of the defendants with regard to evidence of past mental disability. We therefore conclude that the trial court's erroneous jurisdictional ruling was harmless error.

9. Rule 39(b) states in part:

> (n)otwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues.

10. In Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir.1981)(en banc), this court adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981. Id. at 1209.

11. In Stein v. Reynolds Securities, Inc., 667 F.2d 33 (11th Cir.1982), this court adopted as binding precedent all of the post-September 30, 1981, decisions of Unit B. of the former Fifth Circuit. Id. at 34. Unit A cases after that date, such as Unum, are not binding on this court.

12. There is no evidence that counsel for the defendants either knew of Wilson's disability prior to July 1, or knew of the possibility he would be unavailable as a witness.

13. Dr. Harden specified that Wilson "was suffering from symptoms of overt feelings of dependency, loss of appetite, frequent crying spells, irritability, inability to enjoy himself or other people, decreased libido and severe insomnia." Apparently Wilson's neurologist continued to treat Wilson for the seizure disorders, while Dr. Harden's purpose was to attempt to treat Wilson for the dementia.

14. Rule 804(b)(1) allows the admission of testimony by a declarant who is unavailable as a witness when that testimony was:

> given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliancewith the law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

Fed.R.Evid. 804(b)(1). Rule 804(a)(4) provides that unavailability may arise by virtue of "then existing physical or mental illness or informity."

15. In arguing that the defendants did not meet their burden of proving Wilson's competence at the time of the deposition, appellant relies on Huff v. White Motor Corp., 609 F.2d 286 (7th Cir.1979). That case, however, is clearly distinguishable. Huff involved the admissibility of a statement made by an accident victim while hospitalized for an injury from which he eventually died. The defendant attempted to have the statement introduced under the residual hearsay exception of Rules 803(24) and 804(b)(5). The trial court excluded the statement by the decedent. On appeal, the Ninth Circuit reversed and remanded to allow admission of the statement conditioned upon the proponent's proving by a preponderance of the evidence the mental capacity of the decedent at the time he made the statement. Significantly, however, there was direct testimony to the effect that during the decedent's hospitalization "he was not physically able to carry on a conversation," and that "he didn't seem to know what was going on." Id. at 292-93 & n. 10. In contrast, there is no evidence in the instant case of Wilson's similar incapacity at the time of the deposition. Moreover, we are concerned here not with the residual hearsay exception, for which the proponent must prove circumstantial guarantees of trustworthiness, but with the introduction of prior testimony, which necessarily involves

cross-examination under oath by a party with a similar motive for exploring the truth of the declarant's statements.

Appellant's reliance on cases under Rule 804(a)(3) involving lack of memory, in which the witness must testify as to his inability to remember, is similarly misplaced. The requirement of testifying is necessary to establish the sincerity of the witness's belief that he cannot remember. See 4 Weinstein's Evidence Rule 804(a)(01)(1979). In contrast, unavailability under Rule 804(a)(4) due to physical or mental infirmity is based on the declarant's inability for medical reason to withstand the righrs of testifying at trial. This type of unavailability generally will preclude the physical presence of the declarant at trial. See id.